INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 956

ROBERT H. MEADE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 5–10) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 1, 1943 (R. 10). The petition for a writ of certiorari was filed on April 26, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, under Section 1 of the Act of June 10, 1922, as amended, a lieutenant of the Staff Corps of the United States Navy whose total commissioned service equals that of a single lieutenant commander of the line of the Navy is entitled to receive the pay of the fourth period, paid to the lieutenant commander, notwithstanding that the latter's commissioned service is not concurrent with that of the lieutenant but includes service as a midshipman pursuant to appointment to the Naval Academy prior to the Act of March 4, 1913.

STATUTES INVOLVED

Section 1 of the Act of June 10, 1922 (c. 212, 42 Stat. 625, 626), as amended by the Act of May 23, 1928 (c. 715, 45 Stat. 719, 720), provides in part:

> The pay of the fourth period shall be paid to * * * lieutenant commanders of the Navy * * * who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army * * *; and to lieutenant commanders and lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy, drawing the pay of this period.

The Act of March 4, 1913 (37 Stat. 891) provides in part:

> Hereafter the service of a midshipman at the United States Naval Academy * * *, who may hereafter be appointed to the United States Naval Academy * * *, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps.

STATEMENT

Petitioner brought this suit to recover $1,500 more or less, subject to exact computation by the General Accounting Office. Pursuant to the 1922 Act, as amended, *supra,* petitioner claimed the difference between the pay and allowances of the third period, which he now receives, and the pay and allowances of the fourth period, which is being paid to one Lieutenant Commander Robert S. Robertson, Jr., for the period from October 16, 1939 to date of judgment. (R. 1–3.)

The pertinent facts, as found by the Court of Claims (R. 4–5), may be summarized as follows:

Petitioner was appointed midshipman, United States Navy, on June 16, 1922; he was commissioned Ensign from June 3, 1926; commissioned Lieutenant, junior grade, Civil Engineer Corps, from June 3, 1929; and commissioned full Lieutenant in that Corps from June 1, 1936, which rank he now holds (R. 4). For purposes of pay, petitioner seeks to compare his record of active service with that of Lieutenant Commander Robertson (R. 2, 5), who was appointed midshipman

on June 15, 1905; commissioned Ensign from June 5, 1911; commissioned regular Lieutenant, junior grade, from June 5, 1914; commissioned Lieutenant on the retired list from July 1, 1918; and commissioned Lieutenant Commander on the retired list from April 26, 1928 (R. 4–5). After several periods of active duty, Lieutenant Commander Robertson was detached from duty on September 29, 1928, but again ordered to active duty on October 16, 1939 (R. 4–5). Since reporting for active duty on October 18, 1939, Robertson has received the active duty pay and allowances of an officer of the fourth pay period (R. 5).

On the basis of the foregoing facts, the Court of Claims, with one judge dissenting, dismissed the petition (R. 5), holding that since petitioner, unlike Lieutenant Commander Robertson, was precluded by the 1913 Act from counting his service as a midshipman at the Naval Academy when computing length of service for pay period purposes, and since the services of Robertson and petitioner were not concurrent, they were not comparable, and that after deducting the midshipman's service from petitioner's record, petitioner was short of the fourteen years of active commissioned service required to entitle him to fourth period pay (R. 6).

ARGUMENT

Petitioner, as a civil engineer, is a lieutenant "of the Staff Corps of the Navy," and Robertson

is a lieutenant commander "of the line of the Navy" (U. S. Navy Regulations, 1920, Articles 148 (1), 151). Petitioner maintains that under the 1922 Act, *supra,* p. 2, he is entitled to the fourth period pay which Robertson has been drawing since October 18, 1939, because the "total of his active commissioned service equals that of Commander Robertson" (Pet. 3). Petitioner apparently bases this contention on the fact that his active service from his appointment as midshipman on June 16, 1922, up to October 18, 1939, when Robertson commenced receiving fourth period pay, totals 17 years, 4 months, and 16 days (or 13 years, 4 months, and 16 days, if computed from his commission as ensign on June 3, 1926), while Robertson's active service from his appointment as midshipman on June 15, 1905, up to October 18, 1939, totals 16 years, 6 months, and 6 days (or about 10 years and 6 months, if computed from his commission as ensign).[1] It is our

[1] The court below made no specific finding as to the length of Robertson's active service, but the opinion refers to it as 16 years, 6 months and 6 days (R. 7). That total, however, is to be derived from the specific findings of fact showing the various intervals between Robertson's several calls to active duty and his detachment therefrom (R. 4–5). Such active service occurred in part while Robertson was on the retired list. After retirement of a naval officer from active service on account of incapacity (Rev. Stat. § 1453, 34 U. S. C. § 417), he may be ordered to active duty during time of war or national emergency, or with his consent (Rev. Stat. § 1462, 34 U. S. C. §§ 421–423).

position that the court below properly rejected petitioner's claim under the 1922 Act.

1. The 1922 Act requires that Staff Corps lieutenants claiming the benefit of fourth-period pay establish a "total commissioned service" equal to that of lieutenant commanders of the line drawing such pay. This has been construed to mean that the service of the officers between whom comparison is made must be concurrent in point of time, and it has been consistently so applied administratively. The service of Lieutenant Commander Robertson was not concurrent with that of petitioner.

Section 1 of the 1922 Act accords fourth-period pay to (1) "lieutenant commanders of the Navy * * * who have completed fourteen years' service," (2) lieutenant commanders of the Navy "whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army," and (3) "lieutenant commanders and lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy, drawing the pay of this period."

Both the Court of Claims [2] and the Comptroller General [3] have construed the 1922 Act to require

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[2] *Roggenkamp* v. *United States*, 76 C. Cls. 329.

[3] 4 *Comp. Gen.* 249, 251 (1924); 99 MS. *Comp. Gen.* 743, A29398, Nov. 14, 1929; Opinion B8379, March 4, 1940.

the staff officer seeking fourth period pay to establish a commissioned service which commenced prior to or at the same time as that of the lieutenant commander of the line drawing such pay, and this has been the consistent practice of the Navy in its administration of that Act.[4] Such construction of a doubtful or ambiguous statute by the officials charged with its administration should not be judicially disturbed except for reasons of weight (*Brewster* v. *Gage*, 280 U. S. 327, 336; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 377–379), which neither the petition nor the record presents.

The requirement of concurrence of commissioned service finds support in the general objectives of the provision here in question. As its legislative history reveals, Section 1 of the 1922 Act was intended to correct the then-existing inequality in pay received by a line officer and a Staff Corps officer who had served the same length of active commissioned service, due to the more rapid promotions in rank and the consequent increased pay accorded to the line officer.[5]

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[4] Authority: Office of the Paymaster General, United States Navy.

[5] Hearings on H. R. 10972, Special Committee of the House of Representatives, 67th Cong., 2d Sess., p. 23; H. Rept. No. 753, 67th Cong., 2d Sess., p. 3; S. Rept. No. 526, 67th Cong., 2d Sess., p. 3; see *Roggenkamp* v. *United States*, 76 C. Cls. 329, 332–333.

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This objective would plainly preclude any comparison, for purposes of fourth period pay, between Staff Corps and line officers to whom different standards of pay may be applicable as a result of the different time at which they were first commissioned.[6]

The soundness of the construction of the 1922 Act adopted by the administrative and accounting officers of the Government and by the Court of Claims is most forcibly revealed by its alternative. Prior to passage of the Act of March 4, 1913 (*supra*, pp. 2–3), midshipman service could be included in computing the length of service of any officer of the Navy for pay purposes. *United States* v. *Noce*, 268 U. S. 613. The 1913 Act

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[6] Petitioner rests his case largely on the authority of *Marvin* v. *United States*, 78 C. Cls. 567. That case is inapposite. It held that a Coast Guard officer (to whom the 1922 Act also applied) who had been in active service for some years, then was retired for incapacity, and finally was recalled to active duty, could compare his total active service for purposes of fourth period pay under the 1922 Act with that of an officer who had been continuously in active service in the line of the Navy, *beginning at a time subsequent to commencement of plaintiff's first active service.*

Unlike the present case, the *Marvin* case did not involve either an attempt to compare the plaintiff's service with that of another officer previously begun or an attempt to count midshipman service in computing length of service for purposes of pay. In addition, the plaintiff in the *Marvin* case based his comparison on the second category of the 1922 Act, *viz*, "lieutenant commanders of the Navy * * * whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army."

prohibited the counting of such service, for pay or other purposes, by officers who completed their midshipman service after the 1916 class. Hence, Robertson, who was appointed to the Academy in 1905, was entitled to include his midshipman years in the computation of his active service, thereby becoming eligible for fourth period pay under the 1922 Act, whereas petitioner, whose midshipman appointment came in 1922, could not include his four years at the Academy and consequently fell short of the fourteen years of active service which would have entitled him to fourth period pay by comparison with his contemporaries drawing such pay as lieutenant commanders. But if petitioner, a Staff Corps lieutenant who began his midshipman service after 1916, could compare himself with *any* lieutenant commander of the line who graduated from the Naval Academy before 1916, he would receive higher pay than his contemporary lieutenant commanders of the line who have the same term of commissioned service but who, like petitioner, completed their midshipman service after 1916 and thus may not count such service for purposes of fourth period pay. This unintended result would merely serve to perpetuate in reverse the very inequality of pay between line and Staff Corps officers which Congress sought to eliminate by the 1922 Act.[7]

[7] Congress' intention that concurrent service be the basis of comparison between Staff Corps and line officers for pay purposes is illustrated by an analogous provision in the 1922

2. Apart from the requirement of concurrence in time between the commissioned service of the officers who are the subject of comparison for purposes of fourth period pay, petitioner was properly denied recovery because his "total commissioned service" does not equal that of Robertson, who is entitled to include his midshipman's service.

As already stated (pp. 8–9), prior to the 1913 Act, service as a midshipman at the Naval Academy could be counted in computing length of service for pay purposes by the Navy. The 1913 Act, applicable to midshipmen "who may hereafter be appointed," provided that their midshipman service "shall not be counted in computing for any purpose the length of service." Petitioner's appointment as midshipman was made in 1922, and he may therefore not include his service

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Act, that fifth period pay shall be paid to lieutenant commanders of the Navy who have completed 23 years' service, whereas lieutenant commanders of the Staff Corps, appointed to a grade above that of ensign between March 4, 1913, and June 7, 1916, shall receive such pay after completing only 20 years' service. The Act of March 4, 1913, *supra*, pp. 2–3, permitted midshipman service to be counted for purposes of pay for those who were graduated from the Naval Academy before June 7, 1916, whereas the many Staff Corps officers who came direct from civil life into the service in that period with a minimum rank of lieutenant (j. g.) enjoyed no comparable elongation of service. Hence to equalize pay for equal commissioned service these Staff Corps officers were accorded fifth period pay for only 20 years' service. Hearings on H. R. 10972, Special Committee of the House of Representatives, 67th Cong., 2d sess., pp. 23–24.

as midshipman within his "total commissioned service." Without these four years at the Academy, his service amounts to a little more than thirteen years. Lieutenant Commander Robertson, on the other hand, served as a midshipman between 1905 and 1911, and was therefore entitled to count his midshipman service for pay purposes, thus giving him the fourteen years' service required by the 1922 Act for fourth period pay. The Staff Corps lieutenant claiming fourth period pay under the 1922 Act must show a total *commissioned* service equal to the *entire service* of the lieutenant commander of the line. *Cf. United States* v. *Lenson*, 278 U. S. 60, 62. Consequently, petitioner's "total commissioned service" does not equal the service of Lieutenant Commander Robertson's for purposes of fourth period pay, as the court below properly held (R. 6–7).

There can be no doubt that the 1913 Act is still in effect. Its express purpose was to eliminate the inequality in computing length of service for pay purposes which previously had existed between officers educated at Government expense at the Naval Academy and officers educated elsewhere at their own expense. It is inconceivable that the 1913 Act, enacted after long controversy and nullifying the effect of two decisions of this Court,[8] was intended to be repealed by the 1922

[8] This Court had held in *United States* v. *Morton*, 112 U. S. 1, and *United States* v. *Watson*, 130 U. S. 80, that service in

Act, as amended, without even mention of midshipman service, especially since there is no real inconsistency between their provisions.[9] To extend to petitioner the benefit of midshipman service denied to his contemporaries in the line, because another officer, whose Academy appointment antedated the 1913 Act, is entitled to count his midshipman service, would in effect nullify the 1913 limitation. Such an implied repeal, encountering the traditional prejudice against that form of legislative amendment (*United States* v. *Greathouse,* 166 U. S. 601, 605; *Frost* v. *Wenie,* 157 U. S. 46, 58; *United States* v. *Yuginovich,*

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the Military Academy should count as Army service for longevity pay and retirement. This practice also was followed by the Navy Department. The question of counting Academy service for pay purposes long had been an issue between Army and Navy officers and the Treasury's accounting officers. The result of counting Academy service in computing pay of Army and Navy officers was discrimination against civilian appointees who paid for their own preliminary education and were commissioned without having had an Academy education. To eliminate this unfair disparity, Congress enacted the Act of August 24, 1912 (37 Stat. 569, 594), prohibiting the counting of Military Academy service in computing the pay of Army officers. The companion 1913 Act then applied an identical restriction to Navy officers. See H. Rept. 270, 62d Cong., 2d Sess. The legislative and judicial history of the 1913 Act are set forth in *United States* v. *Noce,* 268 U. S. 613.

[9] The Conference Report on the 1942 Act recognized that there has been no implied repeal, pointing out that the matter of counting Academy service in computing length of service for pay purposes "is already covered by existing laws" (H Rept. No. 2152, 77th Cong., 2d Sess., p. 13).

256 U. S. 450, 463), is without basis in any demonstrable policy.[10]

3. If, in lieu of comparison with a particular lieutenant commander selected by petitioner, his claim be rested upon comparison with the *class* of lieutenant commanders of the line entitled to fourth-period pay under the 1922 Act (as would indeed appear to be required by the use of the plural in the statute), denial of his claim is equally proper. Under familiar principles of statutory construction,[11] the "lieutenant commanders of the line" drawing fourth-period pay, referred to in Section 1 of the 1922 Act, must, if possible, be construed to refer to the "lieutenant commanders of the Navy" (i. e. of the line) mentioned earlier in the same section. It would then

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[10] Judge Madden, dissenting, argued (R. 9) that the decision of the majority would turn the statutory phrase "whose total commissioned service equals that of lieutenant commanders of the line of the Navy, drawing the pay of this period" into an unnecessarily verbose way of saying "whose total commissioned service equals fourteen years." This argument overlooks the fact that the 1922 Act also extends fourth period pay to lieutenant commanders "whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army" (see p. 2, *supra*). It also overlooks the fact that his construction would construe the provision as if it read "whose total commissioned service equals that of that lieutenant commander of the line of the navy with the shortest service, drawing the pay of this period."

[11] Cf. *Pampanga Mills* v. *Trinidad*, 279 U. S. 211, 218.

refer to lieutenant commanders of the line who received fourth-period pay either because they (1) "have completed fourteen years' service," or because (2) their "first appointment in the permanent service" was above that of ensign (the equivalent of second lieutenant in the Army). Petitioner makes no showing of equality of service with lieutenant commanders in the second category. He has equally failed to establish comparison with those in the first category because, without his midshipman service, denied to him for this purpose by the 1913 Act, his service totals less than fourteen years, as the court below properly held (R. 6).

4. The question involved herein is of no continuing importance, for the Act of June 16, 1942 (c. 413, 77th Cong., 2d Sess.), repealed the 1922 Act, as amended, and enacted no provision similar to that here involved.[12]

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[12] There is no merit to petitioner's contention (Pet. 4–5) that the 1942 Act repealed only the 1922 Act and not also the Act of May 23, 1928 (45 Stat. 719) which amended the 1922 Act in particulars not here pertinent. Although the 1942 Act saved "Acts or parts of Act incorporating directly, by implication, or by reference, the provisions of the Act of June 10, 1922, as amended, and not in conflict herewith," it expressly repealed the 1922 Act, *as amended*, and therefore repealed the 1928 Act to the extent it amended the 1922 Act. This was clearly the intention of Congress. See H. Rept. No. 2080, 77th Cong., 2d Sess., p. 2.

CONCLUSION

The decision of the Court of Claims is correct. There is no conflict and the case presents no question of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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